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No. 80-109

In the Supreme Court of the United States

October Term, 1980

ESTATE OF JACQUELINE ELKINS SHELTON, DECEASED, DONALD C. LITTLE AND JOHNNIE MOHON, CO-EXECUTORS,
Petitioners-Appellants,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Are the Shelton Estate's quarterly payments derived from her 10.77837 Osage Headrights or restricted mineral interest in the Osage Tribunal trust (of which the United States is trustee) taxable as Federal income taxes, and does decedent's limited *Certificate of Competency* subject this decedent's 10.77837 Osage Tribal Trust headright or quarterly payments to Federal income taxes?

2. Did the Shelton estate "constructively receive" income in 1970 to the extent of interest paid on a refund of estate taxes assessed and paid for the estate of her mother, Mary Elkins? (2) Did such refund and interest thereon constitute a bequest from her mother's estate? (3) Was the Elkins estate still under "administration" by the Osage Indian Agency in 1970?

3. Did the Tax Court err in determining that the interest paid by Treasury to Interior in the year 1970 constitute income constructively received in 1970 by Shelton on the "cash" basis?

4. Did the Tax Court err in its holding on "constructive receipt" that the insistence of the Petitioners that the refund be paid to the Kansas Domiciliary estate rather than to the Oklahoma Ancillary estate, as insisted on by the Trustee, was without merit?

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APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners, Estate of Jacqueline Elkins Shelton, Deceased, Donald C. Little and Johnnie Mohon, Co-Executors, pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit entered into the above captioned case on February 25, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals (A1) is reported in ..... and that of the United States Tax Court is reported in 68 TC No. 2. These opinions together with the Court of Appeals denial of Petitioners-Appellants' petition for a rehearing are separately appended hereto.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit (A1) was entered on February 25, 1980. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

On July 18, 1967, at a hearing before the Field Solicitor at the Osage Agency at Pawhuska, Oklahoma, the Last Will and Testament, dated May 15, 1966, of Mrs. Shelton was offered for the approval of the United States Osage Agency.

Although the deceased was a Kansas resident and not a resident of Oklahoma, the United States Osage Indian Agency was in the possession and in control of the Headright quarterly payments due the deceased's estate from the Osage tribal mineral trust, which should be paid to the Domiciliary co-executors in Kansas as was properly done in the preceding similar case of Kansas resident, Edward McBoulanger, Oklahoma Ancillary proceeding No. 7741 in 1964-1966. (See pages 99 and 100 on Petitioners' brief in tax court below.)

Because an educational trust was included in paragraph XI of this decedent's Will for the benefit of the children of the deceased, that is, John Hayward, Jr., over 21, Candace Marie Shelton then (1968) age 19, Robert Elkins Shelton, age 18, these minor children and their father informed the Osage Agency that no guardian ad litem need be appointed and the Will should be approved, for the beneficiaries, that is, the children of Mrs. Shelton's children. No guardians were appointed since before the estate could be closed, and the educational trust turned over to the two trustees named in the Will, the two minor children, Candace Marie Shelton, age 19, and Robert E. Shelton, age 18, would both be over 21 years of age, because the Act of Congress of April 18, 1912, provides that:

> "No guardian shall be appointed for a member whose parents are living unless the estate of said minor is being wasted or misused by said parents" which Federal statute was quoted with approval and approved as early as the case of Williams v. Hewitt, 74 Okl. 283, 181 Pac. 286 (1919).

K.S.A. 59-1401 orders the Kansas Domiciliary co-executors to marshal all intangible personal property owned by the decedent, Jacqueline Elkins Shelton, wherever located either directly or by Ancillary administration and within one year from date of death to take possession of all intangible property wherever located, the same to be held, administered and finally distributed as provided by law.

K.S.A. 59-1401 further directs the Domiciliary executors to pay the taxes and collect the earnings therein until the estate is settled and until distributed by order of the Domiciliary Kansas Court to the heirs, devisees and legatees named in the will.

According to the laws of Oklahoma:

> "Validity and interpretation of wills is governed when relating to personal property by the law of the testator's domicile at the time of his death." (Sec. 1534 Oklahoma Statutes 1931).

Oklahoma Statutes of 1971 84-20 provide:

> "Law governing validity and interpretation of wills—except as otherwise provided, the validity and interpretation of wills is governed, when relating to real property within this state of the laws of this state; when relating to personal property, by the laws of the testator's domicile."

And the Oklahoma rule is that:

> "Legal title to personalty of the decedent who dies testate vests in personal representative until it is distributed in accordance with will." (Oklahoma Statutes 1931 Sec. 1217).

The Court's attention is invited to *"Petitioners' 2d Amended Requested Findings of Fact"* numbers:

> No. 7 page 11; 8 page 13 (Ex. 57); 9 page 14; 10 page 15; 10A page 16; 11 page 17; 12 page 18; 13 page 19; 14 & 15 pages 20 & 21 (Ex. 54); 17 page 23; 19 pages 25, 26 & 27 (Ex. 41); 21-22 pages 30, 31 & 32 (Ex. 26-Z); 24 page 33; 25 page 34; 26 & 26a pages 35, 35a; 27 & 28 page 36; No. 28; No. 29; No. 30; No. 31; No. 32.

Petitioners object to this erroneous and unwarranted *conclusion* that she was unrestricted, because, on the contrary her mineral properties were specifically *excepted* by Congress from the operation of her Certificate of Competency. Thus these mineral interests called headrights

were and still are, restricted and are not unrestricted or non-restricted.

Mrs. Shelton while alive was certainly not non-restricted to the extent that she was free to alienate or sell, or mortgage any or all of her restricted 10.7837 Osage mineral headrights.

Respondent's statement that Mrs. Shelton was a *non-restricted* Indian is an unsupported, unwarranted and self-serving *conclusion* inserted by the United States I.R.S. in an effort to strengthen *their tax claim.*

The amendments to the Osage Allotment Act in 1912 then in 1947 (37 Stat. 86, 88; 61 Stat. 747) specify that restricted *land* funds and *mineral interests* held in trust and *under restriction* "Shall not be subject to liens, levy, attachment or forced sale * * * prior to the issuance of a certificate of competency." 61 Stat. 745.

By words "prior to a Certificate of Competency * * *" Congress meant prior to the issuance of the certificate of competency to the Osage headrights that formed part of the Osage Tribal Mineral Trust, and that could not be done before January 1, 1985.

In view of the firmly established policy of over 150 years of favorable construction of statutes where Indians are involved, especially tax statutes, Congress was on notice that if it intended any change in the law it should speak.

Congress did speak in the 1929 and 1938 Amendment, 45 Stat. 1478, Sec. 1; 52 Stat. 1034, Sec. 3, when it directed that "* * * *all royalties and bonuses arising therefrom* * * * *shall* be disbursed to members of the Osage tribe or their heirs or assigns as now provided by law. * * *." (Emphasis ours).

See also the Act of June 24, 1938 amended, Sec. 1 of the Act of March 2, 1929 (45 Stat. 1478) relating to the Osage Indians.

Since Congress has not yet *reserved any amounts for the specific purpose of* payments of *Federal* estate or income taxes—headrights are not taxable—and until Congress does do so—*these mineral interests are exempt* from Federal estate and income taxes.

Each quarterly *distribution* payment from a headright is but a *single part* of the *whole headright.* As stated by the 10th Circuit Court of Appeals in *Taylor v. Tayrien,* 51 F. 2d 884 at 896, cert. denied 284 U.S. 672.

> *"The right of Osage Indians in these funds and to participate in these distributions is called a headright."*

This means that all of these quarterly distributions *added together* constitute the *whole* of *each* Osage mineral interest or Osage headrights, and since the sum of all the parts (total of all quarterly distributions) *must equal the sum of the whole*—it follows that the United States, as trustee, cannot return the *whole* headright to any Osages on January 1, 1985,—if they do not return all of the parts—and they cannot return all of the parts of the headrights in 1984 if the headright is diminished and depleted by collecting federal income taxes from such quarterly parts of each headright.

This certificate of competency cannot make Osage Headrights includable as the taxable income of a deceased Osage Indian for federal taxes; such a certificate has nothing to do with mineral rights.

This is a case where Kansas State laws challenges U. S. Agencies' rules and regulations that have deprived the State of Kansas and the Kansas Osage taxpayers of their

rights made privileges and guaranteed to them by the Constitution of the United States.

There is a conflict of interest between the State of Kansas on the one hand and the United States for control of and distribution of the assets past, present and future of certain of the Osage tribe of Indians, now under U. S. trust until 1985.

This is also a conflict of interest case between Oklahoma Indian Agency of the United States Interior Department and the State of Kansas and its Domiciliary Probate Court of Wyandotte County, Kansas, and its Kansas domiciliary executor and Kansas domiciliary trustee, being intimidated by the U. S. Internal Revenue Service activities in connection with the activities of the United States agencies of the Treasury Department and the U. S. Department of Justice.

This action is also being maintained on a breach of fiduciary relationship created by the Osage Allotment Act as amended by the February 8, 1948 Act of Congress (62 Statute 18).

STATEMENT OF NATURE OF THE PROCEEDINGS AND DISPOSITION BELOW

This is an Appeal from a decision of the United States Tax Court entered May 18, 1977 affirming the Commissioner of Internal Revenue's redetermination of deficiencies in income taxes of the petitioners' fiduciary estate for the years as follows:

Year	Deficiency
1968	$ 4,446.33
1969	$ 8,139.57
1970	$71,216.38

The trial was commenced in Kansas City, Missouri before Judge Wilmer on February 9, 1976; after a change of judges the trial was continued before Judge Bruce M. Forrester in Kansas City, Missouri on June 6th, 1976. The evidence consisted of a stipulation of facts with exhibits attached, additional exhibits submitted on oral stipulation, oral testimony and exhibits 1 to 69 inclusive, received at the trial.

Notice of Appeal filed August 19, 1977.

As noted above this case was commenced as a United States claim for Federal Income Tax deficiencies.

Appellant denies that any Osage headright interest owner, be his property restricted or erroneously labeled "unrestricted", who had received a limited certificate of competency under Congress Mandatory Certificate of Competency Act of 1948 (62 Stat. 18) is taxable on the so-called headright royalty income received as quarterly payments and as such Indian's share of the Osage Tribal trust income from mineral leases.

This Court adopted *White v. Pearlman* background rule in September of 1930, and later followed it in *Taylor v. Tayrien,* (51 F.2d 884, Cert. denied 284 U.S. 672 (1931)). And now in this *Shelton* case the reason for that rule applies with even stronger force, and we respectfully submit this is the time and place to again follow and apply this rule in this *Shelton* case of an Osage Indian petitioning here for long delayed and denied right and justice.

In the *Choteau* case the tax collectors were trying to collect a claimed deficiency against an individual living Osage who had received a limited certificate of competency in 1910, years before there was any income tax law. In the *Choteau* case the United States was also trying to collect a portion of his quarterly headright payment principal as income. The United States was not trying to collect this fund from his estate after his death but during his lifetime, even before he died and his estate probated. This *Shelton* case is a case where the government is trying to re-collect a part of the principal, i.e. quarterly payments, of the estate a deceased Osage who had received a certificate of competency in 1948 *lifting* the restrictions on the *surface land only* and at the same time by the same Act *excepting* and separating the mineral tribal headrights interest underneath the surface lands from the operation of the limited 1948 Act, 62 Stat. 18.

The difference between the two cases is carefully pointed out by the Court in the case of *Taylor v. Tayrien,* supra which clearly distinguishes and clearly points out the differences between the Government's position in the *Choteau v. Burnett* case and *Taylor v. Tayrien,* where this 10th Circuit Court, was composed of the late Judge Lewis, the older Judge Phillips and the late Judge George T. McDermot.

In *Taylor v. Tayrien, et al.*, 51 Fed. Rep. 884 (Cert. denied 284 U.S. 672) at page 892 the Circuit Court states, we quote:

> "Counsel also rely upon Choteau v. Commissioner decided by this court (38 F. (2d) 976) and affirmed by the Supreme Court (283 U.S. 691; 51 S. Ct. 598, 75 L. Ed. .....), and particularly some of the language in both opinions. But that language must be considered against the background of the facts. That case dealt *only with moneys actually paid to and in possession of the individual Indian,* which were his to do *with as he pleased.* What the case decided was that Congress had *exercised its undoubted* power to tax this income. We acknowledge the power of Congress to make these headrights alienable; what we hold is, that so far Congress *has not done so.* * * *
>
> "We conclude that no Indian of the Osage Tribe has the right to alienate his headright and that *it is not subject to judicial process.*
>
> "The orders appealed from are affirmed." (Emphasis supplied).

Again as we pointed in our brief, to Tax Court, we cannot understand how the Appellee can connect the *Choteau* case with the *Shelton* case. They involve two entirely different things; *Choteau* alive, *Shelton* dead; money already in the hands of *Choteau* while living and spent by him; and money held back to the United States Treasury from the estates of two dead women, who never received it, neither did their estates' co-executors receive it until March 20, 1975.

In spite of *Taylor v. Tayrien,* in spite of *Shaw v. Commissioner,* in spite of *Mason,* in spite of its own

tax rulings and directions of 1969, in spite of *Squire v. Capoeman,* in spite of Congressional Act of 1948, in spite of tax refunds from both of these estates, in spite of the fact that neither Elkins nor Shelton were residents of Oklahoma at time of death, Shelton in Kansas, Elkins in Colorado, in spite of a separation of their surface land, from federal mineral headright interests under their lands, the I.R.S. still clings, in spite of different times (1910-1967) and different facts, in spite of the Court's ruling in the *Pearlman* case, the U.S. still says this case is controlled by *Choteau,* but as stated in *Pearlman,* every case has to stand on its own facts and is bottomed on its own facts.

If Petitioner is wrong, then there is a new way in which by a combination of almost unbelievable coincidence and by the breathing together of all U. S. Government Agencies, whereby the U.S. can deprive the taxpayer of his property without due process of laws, and by which the I.R.S. can brush under the rug to create what appears to be a legal way to accomplish illegal and unjust results.

16 Am. Jur. 2d, Constitutional Law, Section 199, POWERS OF FEDERAL GOVERMENT AS DELEGATED (on page 434):

> "it is axiomatic, that the United States is a government of limited enumerated and delegated powers, and that it cannot exercise any authority not granted by the Federal Constitution either in expressed words or by necessary implication.
>
> Indeed the Tenth Amendment to the Federal Constitution specifies that the powers not delegated to the United States by the Constitution * * * are reserved to the states, or to the people except where the Constitution prohibits state exercise of particular powers."

16 Am. Jur. 2d, Constitutional Law, Section 204, at page 441 states:

> "Among the matters which are implied in the Federal Constitution, although not expressed therein, is that the National Government *may not,* in the exercise of its powers, prevent a state from discharging its ordinary functions of government. * * *
>
> Therefore, whenever the Federal's power is exerted within what would otherwise be the domain of state power with justification or its exercise must clearly appear."

Section 209, page 447, 16 Am. Jur. 2d EFFECT OF INACTION OF CONGRESS; DOCTRINE OF SILENCE OF CONGRESS:

> "There is a field of concurrent power in which the state may legislate until the power is actually exercised by Congress. * * * The failure of Congress to exercise the power of regulation is deemed to be an expression of its will that the subject should remain free from restriction or impositions upon it by the several states: (see note 13).

What the U.S. is doing is to accuse taxpayer with one hand and putting the other hand over taxpayer's mouth, by denying whereby the taxpayer is denied obtaining evidence in the *exclusive possession* of the U. S. Departments to use in his own defense.

Court should not refuse taxpayer the use of evidence that would prove his contention as the Osage Agency did here.

The Courts wrote this *Choteau* opinion on incomplete agreed facts as they existed in 1910 - not 1980 - they distinguished *Choteau* in *Tayrein* and *Squire v. Capoeman,* 351 U.S. 1, and others.

In 62 Stat. 18, Congress has both implied and expressly said this Certificate of Competency applies *only to surface lands* and *not to the minerals under surface lands* and the headrights are excepted *until a patent* is issued for them in 1985. How can I.R.S. say a Certificate of Competency Act, makes headrights taxable when Congress said they are not, but are excepted from the Act, which Congress said applies only to surface lands and not to the minerals and since whether severed or unsevered they are personal property.

When an Indian taxpayer comes in conflict with the United States, he should be provided by the United States with all the information he feels necessary to his defense, and to protect his property. This the U.S. has not done.

QUESTIONS REMAINING UNANSWERED BY THE UNITED STATES TREASURY DEPARTMENT, THE UNITED STATES INTERNAL REVENUE SERVICE, THE UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES SECRETARY OF INTERIOR, UNITED STATES TAX COURT, THE COMMISSIONER OF INTERNAL REVENUE, APPELLEE, AND THE 10 C.C. APPEALS, IN THIS CASE NO. 77-1964.

1. *Before being assessed* any deficiency taxes, the appellant taxpayer is entitled *to know* the answer to the *thirteen* questions presented and listed in this appeal at page 70 of Rule 7, Sec. 4 of the *Docketing Statement filed herein* under "Questions presented by the appeal expressed in the terms and the circumstances of the case as issues to be submitted to this Court."

2. *Other issues and questions* which the United States Commissioner of Internal Revenue and the Tax Court below have *failed or refused* to answer and which still remain *unanswered* (see page 79 of Rule 7, Sec. 4 of the *Docketing*

Statement filed before the 10 C.C. Appeals in this case No. 77-1964, which were previously filed with the Appellate Division in the Internal Revenue Service, at Kansas City, Missouri, on July 17, 1974, all still unanswered, and all are necessary to any decision of deficiency in this case.

3. *Points to be Relied Upon* by Appellants as set out in pages 49 and 50 of the Original Brief of taxpayer in the U.S. Tax Court in points 1, 2 and 3 and are still not answered.

By reading pages 5759 to 5766 of the Congressional Record of April 7, 1924, this Court can see that there existed a conflict for control of Osage headright funds between the Probate Courts of Osage County and their court appointed guardians under authority of the Act of April 18, 1912 (37 Stat. 86) which appears to provide that the property of deceased Osages in Oklahoma was subject to the jurisdiction of county courts of Oklahoma in probate matters, and the power and control of the United States Department of Interior and Osage Agencies over the estates of Osage lands and headright interests on the other hand.

The Osage County Court and its court appointed guardians on the one hand and the Bureau of Indian Affairs in Oklahoma on the other hand resolved this conflict by the Act of February 27, 1925, 43 Stat. 1008 wherein Congress provided that:

> "The Secretary of the Interior shall invest the remainder, after paying the taxes of such members, in United States bonds, Oklahoma State bonds, real estate, first mortgage real estate loans not to exceed 50 per centum of the appraised value of such real estate, and where the member is a resident of Oklahoma such investment shall be in loans on Oklahoma real estate, stock in Oklahoma building and loan associations, livestock, or deposit the same in banks in Oklahoma, * * *"

The important thing here is that U.S. had deprived and Tax Court has deprived the 49 other states their right to handle their established probate systems probating testate estates of their own citizens according to their own laws, a right guaranteed them, by the Constitution of the United States. This question *transcends and outweighs all the other questions in this case.* All the cases cited by the United States and by the Tax Court have occurred during probate of Oklahoma *resident* Osages who *naturally would probate their estates in their own domicile.*

No matter how many times over and over again, the United States Agencies and Tax Court *cite* the *Choteau* case as the reason for depriving Kansas of its domiciliary jurisdiction, and as a reason for depriving the Osage Indians of their restricted properties without due process of law. The cold hard facts remain that it is unjust and a violation of Indian rights; whose duty it was for the United States to fiercely protect against every form of governmental oppression. *Since the United States failed to do so, responsibility and liability attaches.*

This Court's attention is again invited to the fact that in the case of *West v. Oklahoma Tax Commission,* West was a citizen and a *resident of Osage County, Oklahoma,* while Mary Elkins, who died in 1932 was a citizen and a resident *of Colorado,* and her daughter, Mrs. Shelton, when she died in 1967 was *a citizen and a resident of Kansas.*

> It had formerly been held in case such as *United States v. Richert,* 188 U.W. 432, 437-38 (1903) that the Indian property was exempt from state and local taxes for the reason that this would constitute a tax on "an instrumentality employed by the United States for the benefit and control of this dependent race. . . ." It should be noted that the alternative holding in Richert, that tax immunity was to be implied from

the government's undertaking to keep intact the trust estate, *was reconfirmed in Squire v. Capoeman.*

In 10 C. C. Appeals, just as they did in the Tax Court below, the government, Appellee, still insists *on repeatedly (10 times)* inserting and reinserting and injecting the word *"unrestricted"* into their Answer Brief *to bolster up their erroneous conclusion and the Tax Court's erroneous conclusion, that decedent, Shelton's, mineral trust headrights are subject to Federal income taxes* just as the government also did in their Tax Court Reply Brief in repeatedly *(31 times)* trying to erroneously and knowingly label these tax petitioners' *requested findings of fact as only proposed findings* of fact (see also Tax Court transcript).

The Ninth Circuit relied in *Patterson,* supra, on its prior holding in *Bennett v. United States,* 293 F.2d 323 (9th Cir. 1961), which held:

> "Income is constructively received only when it is subject to the unfettered command and control of the prospective recipient."

In the latter part of 1973 both the Wyandotte County, Kansas, Probate Court and the Osage County, Oklahoma, Probate Court ruled that the refund of the Federal Estate tax due the Elkins estate *should be paid directly to the Kansas co-executors subject to the orders of the Wyandotte County, Kansas Probate Court.*

The United States Treasury has illegally had the use of $69,408.82 of the Shelton money for a period of over 30 years from 1943 to 1975 for which they have paid interest of $92,578.42 which they now seek to tax, *even before* distribution to the Shelton estate. The total tax deficiency plus interest now being claimed by the Service is in excess of $81,000.00 for 1970, even after conceding in their brief that the $91,578.42 should be reduced to $74,062.74.

As stated in *Big Eagle v. United States*, 300 F.2d 765 (1962), in determining whether Congress expressed an intent in the *Osage Allotment Act of 1906* to exempt mineral right income from income tax, to-wit:

> ". . . is that statutes affecting Indians must be liberally construed, with all doubtful expressions being resolved in their favor." (Emphasis supplied) Citing *Capoeman*, supra.

The rationale and holding in *Capoeman*, supra, has been adopted and approved in the 10th Circuit in *United States v. Hallam*, 304 F. 2d 620 (10th Cir. 1962) and in addition quoting the words of Chief Justice Marshall "the language used in treaties with the Indians should never be construed to their prejudice" *Worcester v. State of Georgia*, 6 Pet. 515, 582; *Carpenter v. Shaw*, 280 U.S. 363, 367.

The fiduciary obligations of the government/trustee was also at issue in *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F. Supp. 1238 (U.S. D.C. Calif. 1973) wherein the trustee was held liable for damages for breach of its fiduciary obligations.

THE UNITED STATES TAX COURT AND THE TENTH UNITED STATES CIRCUIT COURT OF APPEALS ERRED IN THE FOLLOWING FINDINGS AND CONCLUSIONS.

The Tax Court and The Tenth Circuit Court of Appeals erred in their conclusion on page 11, paragraph 2, of their opinion that:

> "After carefully examining the Osage Allotment Act and the Amendments to it, we have concluded that the Act, even when liberally construed in favor of petitioner, does not exempt the headright income of an unrestricted Osage Indian from Federal income taxation."

The Tax Court and The Tenth Circuit Court of Appeals further committed error in finding and concluding as stated on page 17 of their Opinion, that:

> "Accordingly, we hold that the rationale of Choteau v. Burnett, Supra, applies; so that the headright income received by the petitioners during the years in question is taxable."

The Tax Court and The Tenth Circuit Court of Appeals further erred in their holding that the interest element of the net Elkins estate tax refund is properly includable in petitioners gross 1970 income because (1) The Elkins refund was constructively received by petitioners during 1970 pursuant to Sec. 451, I.R.C. 1954, (2) Because any income arising from such refund is taxable to petitioners rather than the Elkins Estate, (3) Such income is not excludable from petitioners gross income pursuant to Sec. 102, I.R.C. 1954 as a bequest.

The Tax Court and The Tenth Circuit Court of Appeals erred in finding there was any additional income taxes due on the Estate of Jacqueline Elkins Shelton, deceased.

The United States Tax Court and The Tenth Circuit Court of Appeals erred in not holding that under *Squire v. Capoeman,* 351 U.S. 1; *Big Eagle v. U.S.,* 300 F.2d 765 (1962); *Mason v. United States v. State of Oklahoma,* 461 F.2d 1364 (Court of Claims 1972) and the U.S. Revenue Rulings 69-164, the provisions that all shall be returned in 1984 was a property right which Congress had a right to grant and that such right fully vested in the Osage Tribe of Indians and was binding on the United States, and under the provisions of the 5th Amendment there was no more power to deprive Mrs. Shelton of such a tax exemption than of any other right in this tribal trust property.

The United States Tax Court and The Tenth Circuit Court of Appeals erred in failing to find that Congress in providing for certificates of competency has specifically excepted mineral headrights quarterly payments from such certificate at least until 1984.

That the United States Tax Court and The Tenth Circuit Court of Appeals erred in its construction and application of the Acts of Congress and the Federal Court interpretations of the same as cited by the taxpayer herein in not holding that the obligation of the trustee (United States) is to transfer and return all, at the end of the trust period (in 1984), including all payments received for oil and gas and severed timbers, undiminished by any deductions levied thereon by the guardian or trustee, the United States, and that if any Federal inheritance taxes or income taxes are withheld back from the turnover, then all will not be turned over to the taxpayer.

That the United States Tax Court and The Tenth Circuit Court of Appeals erred in its construction and application of the Acts of Congress and in the Federal Court interpretations of the same in not holding that the Osage Nation by a series of relinquishments of their rights to their own property had received from Congress the stipulations in the Osage Allotment Act, as amended; that the lands allotted by those acts and the mineral rights under the lands should all be returned to the individual members of the Osage Tribal trust in 1985 and, that under *Choate v. Trapp*, 224 U.S. 665 and *Squire v. Capoeman*, (supra) where such a right has vested, the Government is said to have a duty to assert for the Indian or otherwise protect that right of exemption from taxation until 1985.

That the United States Tax Court and The Tenth Circuit Court of Appeals erred in its construction and

the application of the Acts of Congress and in the Federal Court interpretations of the same, as cited by the taxpayer herein, in not holding that in view of the firmly established policy of over 150 years of favorable construction of statutes where Indians are involved, especially tax statutes, Congress was on notice that if it intended any change in the law it should speak and that until Congress does speak, the mineral interests are excepted from Federal income taxation until 1985 and the Tenth Circuit Court of Appeals erred in reaffirming these errors.

The Tax Court admits at page 25 of their opinion that:

> "It has been held that there is no constructive receipt of income where one must surrender a valuable right to realize it. Cohen v. Commissioner, 39 T.C. 1055 (1963); Griffith v. Commissioner, 35 T.C. 882 (1961)."

Requiring petitioners' representatives to receive payment on behalf of the Oklahoma ancillary estate is a substantial restriction and limitation.

If petitioning taxpayer has to give up his constitutional right to choose his choice of forum, and must abandon it and is forced into the United States Tax Court for a lack of funds by the joint action of the United States Internal Revenue Service, the United States Bureau of Indian Affairs, and the United States Department of Justice, then the payment of $160,000 in 1974 was not "subject to taxpayer's unfettered command and control" and was not "available to the taxpayer without substantial limitation or restriction," and was not constructively received, since valuable rights must be surrendered in order to receive this refund.

SUMMARY AND CONCLUSION

These petitioners respectfully submit that substantial rights of many governmental entities, many domiciliary executors and administrators, and many private citizens are dependent upon a definite statement by this Court as to right and ability of the United States Internal Revenue Service to collect the income taxes in question from the estate of a deceased Kansas resident who died a non-resident of Oklahoma.

The Osage trust, unless modified by Congress, will remain in effect until 1984. During that time the question of the right of the United States Internal Revenue Service to levy income taxes on estates such as this will arise regularly. It is important, therefore that the law be clarified so that the United States, as trustee, and all other parties concerned may know whether they are bound to pay such taxes and if so on what portions, if any, of the decedents' estates.

> "Under the Constitution of the United States, as originally established * * * General Acts of Congress did not apply to Indians unless so expressed as to clearly manifest an intention to include them." *Elk v. Wilkins,* 112 U.S. 94 at pages 99-100, 5 S.Ct. 41 at page 44.

This long established fundamental rule was again adhered to by this Court in *Squire v. Capoeman,* 70 S.Ct. at page 616 where this Court cites with approval from 34 *Op. Atty. Gen.* 439, 445 (1925).

Therefore we start with a situation where by historical Congressional practice Congress must affirmatively enact a special Indian Tax Statute in order for the United States

to impose tax liability on Osage quarterly headright payments.

And while tax exemptions may be strictly construed under general rules, the rule is just the opposite as applied to Indians; tax exemptions are found by implication in the Indian Tax Statutes. See *United States v. Hoffman*, 306 F.2d 493 (10th Cir. 1962); *United States v. Hallam*, 304 F.2d 620 (10th Cir. 1962).

As stated and contended for by the United States District Director of Internal Revenue Service, Wichita, Kansas dated 9-9-71 and served on this co-executor:

> * * * "Nothing is stated in 62 Stat. 18 on whether the income from the headrights are taxable or not."

At this point in these proceedings we commence with a situation where no one of these classes of property-surplus lands, homestead, and mineral headrights are taxable but where by the gradual process of Congressional enactments, 1st. One class surplus lands, are freed from Congressional restrictions.

Petitioners disagree with the Government's requested finding No. 12 in the Court below, because the United States Osage Agency does have the authority to withhold quarterly headright payments by holding a sword of Damocles over the Indians' head in the form of a right to revoke the so-called Certificate of Competency when and if, the Superintendent of the Osage Agency chooses to do so, which authority is of itself a form of intimidation and a restriction (Tr. 156 lines 10 to 20). In fact Justice Stone in *Carpenter v. Shaw*, 280 U.S. 369 (1930) states "that a denial by a State Court of a recovery of taxes enacted in violation of the law and Constitution by Compulsion is itself in Contravention of the 14th Amendment."

Although the United States claims to be without authority to withhold *any part* of a quarterly headright payment to an Osage Indian with a Certificate of Competency (Tr. 148). *Yet* nevertheless the United States Osage Agency *did actually withhold* from the Kansas Domiciliary Co-executors of this Estate the quarterly headright payments due these Domiciliary co-executors for the past due quarterly headright payment for June 15, 1967; also the past due September 15, 1967, headright quarterly payment due the Shelton Estate; *and also* the past due *December 15, 1967,* headright quarterly payment from the Treasury of the United States to the Shelton Estate *and also* the correct amounts of interest due these petitioners on each of such quarterly payments.

Speaking generally funds in the hands of administrative Officers of the Government, whether for the benefit of Indians or otherwise, are not subject to attachment, levy, sale, execution, assignment, etc., *in the absence of express legislation by Congress to that effect.*

The rights of Indians made privileged by the treaties, Acts of Congress, and Constitution of the United States *transcends* all other QUESTIONS IN THE INSTANT TAX CASE.

It has long been a matter of common knowledge that the United States bargained with the Osage Tribe for the relinquishment of their lands, 1st in Missouri, 2nd in Kansas and that the U.S. and the Osage *as contracting parties,* contracted by treaties, then by Federal Acts of Congress, to leave the Osages' rights intact except for changes of location. The United States certainly led the Osages to believe and understand that they left them in the same position in all respects except for these 2 changes of location.

These rights of Osage Indians had, by a series of treaties, Congressional Acts, and by executive agreements

extending over 200 years are made privileged by the Constitution of the United States.

Finally, on July 21, 1967, the United States Osage Indian Agency approved the will (See Ex. 23 W); and on the same day, the Solicitor of the Osage Indian Agency at Pawhuska, Mr. Slaughter, wrote co-executor Little that, although the United States approved the will, the United States approval of the will "does not constitute an administrative approval of the release of funds to *the trustee* designated in paragraph 11 of said will".

The petitioners contend that the United States had no right or authority whatsoever to interfere with the normal established probate proceedings, and, had no authority to object to the quarterly headright payments going to the Domiciliary co-executors in Kansas. By doing so and by their objections, the U.S. Osage Agency in their desire to keep the funds of this estate in Oklahoma, have contributed to causing a 5 year delay in the closing of this estate, to which responsibility and liability attaches.

Yet these plaintiffs' attorneys in *Wilkinson et al. v. Hickel* (not reported) claim at page 7 of their briefs filed in that case:

> "* * * Plaintiffs were clearly not intermeddlers, nor are they seeking to force their services on an unwilling client."

Not only have these Osage Indians had their properties taken away from them by duress and compulsion and for inadequate and unjust compensation without due process of law, but today their trust properties are being depleted and whittled away, and although Congress and the United States has had countless opportunities to correct these injustices, yet the United States continues to neglect them and refuses to do anything about them, and has *inadequately represented them.*

JURISDICTION ON WRIT OF CERTIORARI

RULE 19. This is a case:

A. Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

B. Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

RULE 33. United States Supreme Court p. 65—

SERVICE AND SPECIAL RULE WHERE CONSTITUTIONALITY OF ACT OF CONGRESS IN ISSUE

This is a case where 28 U.S.C. 2403 is applicable and Appellant is serving solicitor General Department of Justice, Washington, D.C. with notice under Rule 33(b) which provides:

(b) In any proceeding in whatever court arising herein the constitutionality of any Act of Congress affecting the public interest is drawn in question and the United States or any agency, officer or employee thereof is not a party, all initial pleadings, motions or papers in this

court shall recite that 28 U.S.C. § 2403 may be applicable and shall be served upon the Solicitor General, Department of Justice, Washington, D.C. 20530. In proceedings from any court of the United States as defined by 28 U.S.C. § 451, such initial pleading, motion or paper shall state whether or not any such court has, pursuant to 28 U.S.C. § 2403, certified to the Attorney General the fact that the constitutionality of such Act of Congress was drawn in question.

Appellant further states as pursuant to 28 U.S.C. 2403 no certification was made to the Attorney General of the United States to the fact that the constitutionality of such Act of Congress was drawn into question.

Comes now Appellant, Donald C. Little, and by his Affidavit filed herein certifies that in compliance with paragraphs 1, 2 and 3 of Rule 33 of this Court that he has mailed three copies by depositing in the United States Mail box with First Class postage prepaid to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530; and to James P. Buchele, United States Attorney, Federal Building, Topeka, Kansas 66603; and to G. Scott Nebergall, Trial Attorney, Tax Division, Department of Justice, Washington, D.C. 20530.

DONALD C. LITTLE, *Appellant*
Attorney at Law
7th Floor Huron Building
Kansas City, Kansas 66101
281-1903

APPENDIX A

PUBLISH

(Filed January 14, 1980)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 77-1764

ESTATE OF JACQUELINE E. SHELTON, Deceased,
DONALD C. LITTLE and JOHNNIE MOHON,
Co-Executors,
Petitioners-Appellants,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

Appeal From the United States Tax Court
(No. 4674-73)

Donald C. Little and Willard Mellott (Arthur M. Mellott on the brief), Kansas City, Kansas, for Petitioner-Appellant.

William S. Estabrook, III, Attorney, (M. Carr Ferguson, Assistant Attorney General, Gilbert E. Andrews, and Ann Belanger Durney, Attorneys, with him on the brief), Tax Division, Department of Justice, Washington, D.C., for Respondent-Appellee.

Before DOYLE, McKAY and LOGAN, Circuit Judges.

LOGAN, Circuit Judge.

This is an appeal from a judgment of the United States Tax Court, upholding the Commissioner's determination of deficiencies in income taxes payable by the estate of Jacqueline Elkins Shelton, deceased (taxpayer), for the years 1968, 1969 and 1970. Estate of Jacqueline E. Shelton, 68 T.C. 15 (1977).

The issues on appeal are whether the Tax Court erred (1) in concluding that taxpayer, the estate of a deceased Osage Indian who held a certificate of competency, should be taxed on income from headright shares of the Osage tribal mineral trust; and (2) in finding that taxpayer constructively received interest taxable as income in 1970 as part of a refund of taxes paid by the estate of decedent's mother, of which decedent was the sole residuary beneficiary.

I

Upon our review of the record, the authorities, and the briefs and arguments of counsel, we conclude the Tax Court correctly decided the first issue for the reasons expressed in its opinion. Choteau v. Burnet, 283 U.S. 691 (1931), also involving an Osage Indian holding a certificate of competency, is directly in point and controlling. We see nothing in the subsequent amendments or supplements to the Osage Allotment Act, 34 Stat. 539 (1906), to indicate a change in legislative policy. Neither Squire v. Capoeman, 351 U.S. 1 (1956), stating a policy of liberal construction in favor of Indians, nor Big Eagle v. United States, 300 F.2d 765 (Ct. Cl. 1962), involving a noncompetent Osage Indian, requires a different result. Also, we see no validity in the distinction asserted here between the taxation of a live Indian, as in *Choteau*, and taxation of a deceased Indian's estate. Section 4 of the Act of March 2, 1929, 45 Stat. 1478, 1480, specifically declares

that upon death of an Osage Indian who had been issued a certificate of competency, moneys and other property accruing to his or her credit are to be paid over to the estate. Income received from a decedent's property is taxable to the estate during administration until the income is distributed, in which case it is taxable to the recipient. I.R.C. §§ 61(a)(15), 102(b), 661(a)(2), 662(a)(2).

II

The relevant facts on the constructive receipt issue are as follows. Mary Jacqueline Elkins, a noncompetent Osage Indian, died in 1932. The Osage Indian Agency (Agency), acting for the Elkins estate, filed a federal estate tax return and paid a tax. In 1970, after a change of position by the government on whether property of restricted Osage Indians was subject to the federal estate tax, the Internal Revenue Service paid the Agency a refund of $150,241.96, of which $92,578.42 was allocated to interest on the taxes improperly assessed.

In the meantime Jacqueline E. Shelton, daughter of Mary Elkins and sole residuary beneficiary of her estate, had died. In 1967 domiciliary probate proceedings in the Shelton estate were instituted in Wyandotte County, Kansas, and ancillary proceedings were begun in Denver County, Colorado, and Osage County, Oklahoma.

In a letter dated March 17, 1970, the Agency superintendent advised Donald C. Little and Johnnie Mohon, coexecutors of the Jacqueline Shelton estate in all the probate proceedings, that upon receipt "of an additional coexecutors' bond in the amount of $150,000, or in the amount determined by the court, this office will disburse said Federal estate tax refund to you . . . as coexecutors of the Oklahoma probate." Little, who apparently also served as attorney for the estate, protested payment of

the refund through the ancillary Oklahoma probate proceeding, asserting that it should be paid through the Kansas domiciliary proceeding. The record shows that the Agency, with the support of the Interior Department, insisted upon paying the refund through the Oklahoma proceeding.

Not until May 1974 did the coexecutors obtain the requisite additional bond. On October 10, 1974, the Agency paid funds held by it arising out of the Elkins estate tax refund to Little and Mohon as taxpayer's Kansas coexecutors, pursuant to an order of the District Court of Osage County, Oklahoma, dated November 27, 1973.

The Commissioner determined that taxpayer's reported fiduciary income for 1970 was deficient by the amount of $92,578.42, which represents the taxable interest element of the refund, on the theory that taxpayer had constructively received that income in 1970. The Commissioner conceded before the Tax Court that twenty percent of the refund allocable to interest was not constructively received by taxpayer in 1970 because the Agency had withheld that amount in order to pay a possible claim of two Washington, D. C., law firms for quantum meruit recovery of legal fees for services in securing the original refund. Their claim was limited to twenty percent of the aggregate refund received by estates of Osage Indians. The amount in dispute in the instant case, therefore, is $74,062.74. The Tax Court held taxpayer failed to meet its burden of showing this income was not constructively received in 1970.

Several arguments are advanced to support taxpayer's position that the Elkins estate tax refund is not includable in Shelton estate's gross income for 1970. First, taxpayer contends that any tax payable in 1970 should have been assessed against the Elkins estate and not the Shelton

estate. Under I.R.C. § 641(a)(3) an estate is taxable on income received but not distributed during administration. But if administration of an estate is prolonged for a period longer than necessary for ordinary duties, it is considered closed for tax purposes, and the income, deductions and credits are attributed to the beneficiary succeeding to the property. Treas. Reg. § 1.641(b)(3). The Tax Court here relied upon Tax Court R. Prac. & P. 142(a) to hold the taxpayer had not met its burden of proof to show the Elkins estate was still in the process of administration. Taxpayer asserts that it met its burden because the record shows the Agency, as trustee, filed for the refund in behalf of the estate and kept open the estate's account, to which the refund was credited.

Whether or not taxpayer's assertion is correct, its argument is unavailing. I.R.C. §§ 661(a)(2) provides that income "properly paid or credited," to a beneficiary during the administration of an estate is deductible by the estate. I.R.C. 662(a)(2) makes such amounts taxable to the beneficiary. The record here shows that in 1970 the Agency tendered distribution to taxpayer. If, as will be treated below, taxpayer constructively received the refund in that year, the interest element would be properly included in its 1970 tax return.[1]

Taxpayer also argues that the interest element was in reality part of the original bequest to decedent and therefore not income. *See* I.R.C. § 102. While we sympathize with taxpayer's position of having to report the interest income all in a lump sum, the Tax Court correctly

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1. Distributions are taxable in the beneficiary's tax year in which the estate's tax year ends. I.R.C. § 662(c). Without proof of adoption of a fiscal year by the Elkins estate, and there is none here, the estate would be presumed to be on a calendar year basis, hence 1970 distributions would be reportable in the Shelton estate's return for that year. *See* I.R.C. § 441(g).

decided the question. *See* I.R.C. §§ 61(a)(4); 102(b)(1); Easley Trust v. Comm'r, 228 F.2d 810 (9th Cir. 1955). *Cf.* Squire v. Capoeman, 351 U.S. 1, 9 (1956) (reinvestment income from exempt income subject to tax).

Next, taxpayer argues there were "substantial limitations or restrictions," Treas. Reg. § 1.451-2(a), on taxpayer's right to receive the income in 1970. *See* United States v. Steck, 295 F.2d 682 (10th Cir. 1961). In support of its contention, each of the following is asserted to constitute a substantial restriction: (1) the Agency requirement that the coexecutors post an additional bond; (2) the Agency's insistence that the fund be paid to the coexecutors in the ancillary Oklahoma estate proceeding; and (3) the Agency's withholding of twenty percent of the fund pending determination of the rights of the Washington, D. C., counsel to fees for services in obtaining the refund.

In our view, none of these were substantial restrictions on taxpayer's right to receive in 1970 the refund less the withheld amount. Oklahoma law requires executors in probate proceedings to post a bond in an amount to be determined by the court, if that court deems a bond necessary. Okla. Stat. Ann. tit. 58, § 171 (West 1965). Thus, the Agency's request that the coexecutors provide a bond "in the amount of $150,000 or in the amount determined by the court" was routine when a sum justifying a bond in that amount was to be turned over to the estate; it was no more than a request that the coexecutors show proof they would abide by the law. No case was cited, or found, holding that requiring a normal fiduciary bond in a probate proceeding is a substantial limitation or restriction justifying postponement of income tax consequences until the fiduciary chooses to file it. The fees for such bonds are standard and modest, and would not be different in amount whenever obtained. This case is quite different from Patterson v. Comm'r, 510 F.2d 48

(9th Cir. 1975), upon which taxpayer relies. There taxpayer, a potato grower, was contractually obligated to make a significant outlay for crop insurance as a condition precedent to receipt of payment for a crop if he wanted payment prior to the purchaser's call for delivery. The IRS sought to tax on the constructive receipt theory in the year of harvest. Taxpayer did not purchase insurance until after the end of the year, and his outlay for insurance was less than had he not waited. The Ninth Circuit ruled that the doctrine of constructive receipt should not be stretched to force such monetary choices on a taxpayer.

We hold the Agency's insistence that the fund be paid only through the Oklahoma proceeding was not a substantial restriction whether or not the Tax Court was correct in finding the Acts of April 18, 1912, 37 Stat. 86, and of March 2, 1929, 45 Stat. 1478, vested exclusive probate jurisdiction in the Oklahoma court with respect to amounts held by the Agency for estates of unrestricted Osage Indians. Taxpayer argues it was a substantial restriction because compliance would have caused taxpayer to forego a valuable legal right—receipt of the money through the Kansas proceeding. The record shows the coexecutors thought Kansas payment was important for several reasons. First, they believed such payment would avoid the higher rates of estate taxation imposed by Oklahoma. Mere payment through the Oklahoma proceeding would not trigger tax liability to that state. *See* Okla. Stat. Ann. tit. 68, §§ 802, 818 (West 1966). The funds represented a refund of taxes erroneously paid and interest thereon and thus intangible personal property in the estate of a nonresident, which would seem to be exempt from Oklahoma estate taxes under Okla. Stat. Ann. tit. 68, § 807(A)(1) (West Supp. 1979). Second, they were concerned that the payment would be made to the "wrong persons;" *i.e.*, to the Oklahoma coexecutors rather than

to the Kansas coexecutors. But the payment is in reality to the estate, which is the same in both proceedings; even the coexecutors were the same persons in both proceedings—Little and Mohon. Finally, they thought that payment through the Oklahoma proceeding would be inconvenient. But the coexecutors had opened the ancillary proceeding in Oklahoma before this claim arose, apparently anticipating some other need for it; thus, no new activity had to be undertaken to receive the money except for increasing the fiduciary bond if the Oklahoma court should require it. Coexecutor Mohon was a resident of Osage County, Oklahoma. Thus, the claim of inconvenience in this case is at most *de minimus*. In addition, the coexecutors were firmly informed in 1970 that the Agency would not deliver the funds other than to the Oklahoma coexecutors. At this point it was incumbent upon the coexecutors, if they thought that was erroneous, to bring some legal action to secure a different disposition if they wished to avoid constructive receipt.

The contention based upon the Agency's withholding of twenty percent of the refund for payment of a possible claim against the estate is also without merit. The Commissioner stipulated that the ratable portion of the interest element attributable to this withholding was not constructively received in 1970, and the amount in issue was readily determinable. The Tax Court found that eighty percent of the funds were made available in 1970, and that holding is not clearly erroneous.

Affirmed.

APPENDIX B

[¶ 68.2] 68 TC **No. 2. ESTATE OF JACQUELINE E. SHELTON, Deceased, DONALD C. LITTLE and JOHNNIE MOHON, CO-EXECUTORS.** Docket No. 4674-73. 4-11-77. Opinion by FORRESTER, *J.* Years 1968-1970. Deficiencies redetermined.

INCOME—Rents and royalties—Indians' income from allotted lands—received by unrestricted Indians. Royalty income received by estate of unrestricted Osage Indian from headright shares in tribal mineral trust was includable in estate's gross income. Under Osage Allotment Act, Indian's share of royalties was payable without restriction on use of funds. Fact decedent couldn't sell headrigths didn't make income from rights excludable. *Ref*: 1977 P-H Fed. ¶7293(5).

ESTATES, TRUSTS AND BENEFICIARIES—Tax imposed—decedent's estate during administration. Interest element of tax refund of mother's estate, of which decedent was sole residuary beneficiary, was taxable to decedent's estate, not to mother's. Though mother died in 1936, IRS change of policy on certain Indian rights resulted in refund for her estate in 1970. Since taxpayer didn't prove mother's estate wasn't terminated before refund, amount was income to taxpayer, as successor to property of mother's estate. *Ref*: 1977 P-H Fed. ¶28,018.

TAX ACCOUNTING—Time for reporting income—constructive receipt—substantial limitaton. Tax refund held by agency was constructively received by taxpayer-estate in year agency told executors they could get it upon payment of bond, even though estate didn't actually receive funds until several years later. Refund was credited to account of decedent's mother's estate, of which decedent was sole beneficiary. Taxpayer didn't show amount wasn't

part of residue or that another party had interest. Also, neither bond nor requirement that executors receive payment on behalf of ancillary estate was substantial limitation or restriction on control of receipt of refund. *Ref*: 1977 P-H Fed. ¶20,169.

INCOME—Rents and royalties. Royalty income received by estate of unrestricted Indian from shares in tribal mineral trust was includable in estate's gross income. There were no restrictions on share of royalties received. Fact decedent couldn't sell rights to shares didn't make income from rights excludable. ¶7293(5).

Official Tax Court Syllabus

[1, 2] Petitioner, the estate of a deceased, unrestricted Osage Indian, received income during the years in issue from Osage headright interests. In 1970 IRS paid the Osage Indian Agency a refund of estate taxes paid by decedent's mother (Elkins) and such amount was credited to the Elkins estate's account at the Agency. Decedent was the sole residuary beneficiary of the Elkins estate. The Agency notified petitioner that it would pay these funds (except for a small portion withheld for a contingent liability) to the co-executors of the Oklahoma probate upon receipt of an additional co-executor's bond. Held, the Osage headright income is properly includable in petitioner's gross income. The Osage Allotment Act of June 28, 1906, ch. 3572, 34 Stat. 539, as in effect during the years in issue, does not exempt such income from Federal taxation. Held, further, the interest element of the net Elkins estate's tax refund is properly includable in petitioner's gross income because (1) any income arising from such refund is taxable to petitioner rather than the Elkins estate, (2) such income is not excludable from petitioner's gross income as a bequest pursuant to

sec. 102, I.R.C. 1954, and (3) the refund was constructively received by petitioner during 1970 pursuant to sec. 451, I.R.C. 1954.

Donald C. Little and Arthur M. Mellott, for the petitioner.

Joe K. Gordon, for the respondent.

FORRESTER, *Judge*: Respondent has determined the following deficiencies in petitioner's Federal income taxes:

Taxable Year	Amount of Deficiency
1968	$ 4,446.33
1969	8,139.57
1970	71,216.38

There are two issues for our decision: (1) Whether petitioner, the estate of a deceased, unrestricted Osage Indian, should be taxed on income from its headright shares of the Osage tribal mineral trust; and (2) Whether a certain portion of the interest element of a refund of taxes paid by the estate of decedent's mother, of which decedent was the sole residuary beneficiary, is includable in petitioner's gross income pursuant to sections 61 and 451.[1]

FINDINGS OF FACT

Some of the facts have been stipulated and are so found.

Jacqueline E. Shelton (decedent) died on May 17, 1967, a resident of Wyandotte County, Kansas. Donald C. Little (Little) and Johnnie Mohon (Mohon) qualified as co-executors of decedent's estate in the domiciliary probate proceedings in Kansas and ancillary proceedings in Oklahoma and Colorado. At the time of filing the peti-

1. Unless otherwise indicated, all statutory references are to the Internal Revenue Code of 1954.

tion herein, Little was a resident of Wyandotte County, Kansas, and Mohon was a resident of Pawhuska, Oklahoma. Little and Mohon filed U.S. Fiduciary Income Tax Returns (Form 1041) on behalf of petitioner for the taxable years 1968, 1969, and 1970, with the Internal Revenue Service Center, Austin, Texas.

Issue 1

Decedent was the daughter of Mary Jacqueline Elkins (Elkins) who died testate on June 8, 1932. Elkins died a restricted Indian of the Osage tribe because she had never received a certificate of competency.

As of the date of her death, decedent owned 10.77837 shares in the Osage tribal mineral trust (headrights). Decedent had inherited 8.5 Osage headrights from her mother and she purchased an additional 2.27837 Osage headrights through the Osage Indian Agency (Agency) at Pawhuska, Oklahoma.

Decedent was an unrestricted Osage Indian at the time of her death because she had received a certificate of competency on September 29, 1950.

Under the Osage tribal mineral trust, the Agency receives the gross mineral royalties from leases of the tribe's mineral interests, deducts administrative expenses for management purposes and for operation of the Osage Tribal Council, and then divides the balance according to the various headright interests.

Unrestricted Osage Indians received the full amount allocated to their account on a quarterly basis since the Agency has no authority to withhold any part of a quarterly headright payment from an unrestricted Osage Indian. Under certain circumstances, the Agency can revoke a certificate of competency.

No Osage, whether restricted or unrestricted, may sell his headright, but any Osage may by will devise his headrights to a non-Indian whether or not related by blood, marriage, or adoption, and an Osage may purchase headrights shares from a non-Osage who has inherited such shares.

During the taxable years 1968, 1969, and 1970, the Agency reported to the co-executors that headright income had been paid to petitioner in the following amounts:

1968	$23,180.34
1969	22,755.48
1970	20,080.39

On the Federal income tax returns which the co-executors filed on behalf of petitioner for the taxable years 1968 and 1969, they included, in gross income, the headright income received in those years. On November 19, 1970, however, the co-executors filed a refund claim (Form 843) requesting the repayment of all income taxes paid on behalf of petitioner for the taxable year 1968 on the theory that the headright income which they had included in gross income for 1968 was not taxable. Petitioner's 1968 taxes were refunded with interest on February 17, 1971, and mailed directly to the Kansas domiciliary co-executors. On May 20, 1971, the co-executors filed an amended Federal income tax return on behalf of petitioner for the taxable year 1969. Such amended return for 1969, as well as the return filed for the taxable year 1970, did not include headright income in petitioner's gross income for those years.[2] In his statu-

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2. Even though the original 1969 return had included headright income in petitioner's gross income, the original return also included deductions that were not claimed on the amended 1969 return so that both petitioner's original and amended 1969 returns showed that it owed no tax for 1969. In this proceeding, petitioner does not claim that it is entitled to the deductions which were taken on the original 1969 return but omitted on the 1969 amended return.

tory notice, respondent included such headright income in gross income for the years in question.

Issue 2

The superintendent of the Agency and the executor of the Estate of Mary Jacqueline Elkins, deceased (Elkins estate), filed a Federal estate tax return on which an assessment of $75,638.85 was made in April 1936.

In 1943, the United States Tax Court entered a stipulated decision that the total estate tax liability of the Elkins estate was $63,563.38 of which $330.19 had been paid, resulting in a deficiency of $63,233.19.

In March 1943, the superintendent of the Agency paid under protest $69,408.82. Of such amount, $63,233.19 represented payment of the additional tax and $6,175.63 represented payment of interest thereon.

In 1969, there was a change in the position of the Internal Revenue Service (Service) regarding the Federal estate taxation of restricted Osage Indians and the Service announced that it would accept refund claims from those estates of restricted Indians which were affected by such change of position, regardless of when the Indians had died or when the estate tax returns for their estate had been filed. In September 1969, the Agency filed a claim for refund of the estate tax paid on behalf of the Elkins estate.

In January 1970, the Internal Revenue Service paid $150,241.96 to the Agency as a refund of Federal estate taxes paid on behalf of the Elkins estate. Of such amount, $57,663.54 was allocated to principal and $92,578.42 to interest. The full amount of such refund was credited by the Agency to the Elkins estate's account on January 12, 1970. Decedent was the sole residuary beneficiary under the will of Elkins, her mother. In a letter dated March 17,

1970, the superintendent of the Agency advised petitioner's co-executors that, upon receipt of an additional co-executors' bond, the Agency would disburse the Elkins estate's tax refund to them as co-executors of decedent's Oklahoma ancillary probate estate. Little protested payment of the refund through the Oklahoma probate proceeding and asserted that it should be paid through the Kansas domiciliary proceeding.

On August 29, 1969, the law firms of Wilkinson, Cragun & Barker (Wilkinson) and Files and Mahan (Files) applied to the Secretary of the Interior for payment of legal fees for services rendered in obtaining Federal estate tax refunds paid to Osage Indians, including the refund to the Elkins estate, even though some of the beneficiaries of such refunds, such as petitioner, had not entered into contracts with these firms. The Secretary rejected the claims of the Wilkinson and Files firms and these firms subsequently informed the secretary that they intended to seek a judicial determination of their entitlement to such fees.

Pending the outcome of such suit, the superintendent of the Agency withheld 20 percent of the Elkins estate's tax refund.

On August 13, 1974, pursuant to the judgment entered in the suit brought by Wilkinson and Files, the Agency paid to these firms $378,457.72. The Elkins estate was charged $30,048.39 of this amount allocated to principal and $9,699.52 allocated to interest.

A certified copy of the additional co-executors' bond, which the Agency required prior to payment of the refund to petitioner's co-executors, was mailed to the Agency in May 1974. It is stipulated that on October 10, 1974, a check in the amount of $160,713.50,[3] representing the funds held

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3. The large difference between this stipulated amount and the 1970 payment from IRS to the Agency is not explained.

by the Agency arising out of the Elkins estate's tax refund, was issued to Little and Mohon as petitioner's Kansas co-executors, pursuant to the November 27, 1973, order of the District Court of Osage County, Oklahoma.

In his statutory notice, respondent increased petitioner's taxable income for 1970 by $92,578.42, as representing the taxable interest element of the Elkins estate's tax refund which petitioner had not reported, on the theory that petitioner constructively received such refund in 1970. However, respondent concedes in his brief that the ratable portion of the refund allocable to interest (which was withheld by the Agency pending judgment in the Wilkinson and Files suit) was not constructively received and reduces his prayer the requisite amount. Respondent computes this reduction as being $18,509.81, but we find the proper figure to be $18,515.68.

OPINION

Issue 1

Petitioner contends that the income which it received from Osage headright shares during the taxable years 1968, 1969, and 1970,[4] is not properly includable in its gross income pursuant to section 61.[5] Petitioner asserts that the Osage Allotment Act of June 28, 1906, ch. 3572, 34 Stat. 539 (hereinafter Osage Allotment Act), as in effect dur-

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4. Petitioner argues in its brief that it is entitled to Federal income tax refunds for the taxable years 1959 and 1961 through 1967. However, we have no jurisdiction to determine the validity of such claims since respondent has not issued notices of deficiency for those years. Sec. 6214(b), I.R.C. 1954.

5. SEC. 61. GROSS INCOME DEFINED.

(a) General Definition.—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

* * *

(15) Income from an interest in an estate or trust.

ing the years in issue,[6] exempts petitioner's headright income from the Federal Income tax. We disagree.

It is fundamental that Indians are citizens and are liable for the payment of Federal income taxes unless applicable treaties or remedial legislation provide an exemption. Squire v. Capoeman, 351 U.S. 1 [49 AFTR 178] (1956). While the general rule requires tax exemptions to be clearly expressed, statutes affecting Indians are liberally construed, with all doubtful expressions resolved in their favor. Squire v. Copoeman, supra; Big Eagle v. United States, 300 F.2d 765 [9 AFTR 2d 932] (Ct.Cl. 1962).

Prior to the passage of the Osage Allotment Act,[7] the Osage reservation, consisting of approximately a million and one-half acres of land with underlying valuable minerals, was held by the United States in trust for the Osage tribe. The Osage Allotment Act was designed to gradually emancipate the Osages. Big Eagle v. United States, supra at 768. Section 2 of this Act allowed each Osage

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6. The Osage Allotment Act of June 28, 1906, ch. 3572, 34 Stat. 539, has been amended and supplemented as follows:

Act of April 18, 1912, ch. 83, 37 Stat. 86;
Act of January 18, 1917, ch. 16, 39 Stat. 867;
Act of May 25, 1918, ch. 86, sec. 17, 40 Stat. 561, 578-579;
Act of March 3, 1921, ch. 120, 41 Stat. 1249;
Act of April 12, 1924, ch. 95, 43 Stat. 94;
Act of February 27, 1925, ch. 359, 43 Stat. 1008;
Act of March 2, 1929, ch. 493, 45 Stat. 1478;
Act of June 24, 1938, ch. 645, 52 Stat. 1034;
Act of August 4, 1947, ch. 474, 61 Stat. 747;
Act of February 5, 1948, ch. 46, 62 Stat. 18;
Act of June 15, 1950, ch. 248, 64 Stat. 215;
Act of September 1, 1950, ch. 832, 64 Stat. 572;
Act of August 28, 1957, Pub. L. 85-192, 71 Stat. 471;
Act of October 6, 1964, Pub. L. 88-632, 78 Stat. 1008.

7. See Big Eagle v. United States, 300 F.2d 765 [9 AFTR 2d 932] (Ct.Cl. 1962), and U.S. Department of the Interior, Federal Indian Law, pp. 1030-1049 (1958), for a more detailed discussion of the background history and of the provisions of the Osage Allotment Act and the amendments to it.

to select three 160-acre tracts and the land remaining after such selection process was concluded was to be divided equally among the tribal members. Each member was allowed to designate one of the three 160-acre tracts as a "homestead" to be "inalienable and nontaxable until otherwise provided by Act of Congress." 34 Stat. 541. The remaining land allotted to each Osage was known as "surplus" land which was to be inalienable for 25 years and nontaxable for three years except that it would become taxable earlier upon the issuance of a certificate of competency or upon the death of the allottee. Section 3 of the Osage Allotment Act reserved the minerals underlying all of the lands to the Osage tribe for a period of 25 years (since extended indefinitely, Act of October 6, 1964, Pub. L. 88-632, 78 Stat. 1008), at the end of which the minerals underlying the allotted lands will become the property of the individual owner of such land. Section 4 of the Osage Allotment Act provided that the royalties from leases of the mineral interests be placed in trust by the United States for the Osages and each tribal member was granted a 1/2,229th share, or headright, of the distributable income from the minerals. Such mineral trust was extended to January 1, 1984, by the Act of June 24, 1938, ch. 645, 52 Stat. 1034 (hereinafter 1938 Amendment). Section 4 of the Osage Allotment Act also provided such mineral royalties, and certain other trust income, should be allocated on a pro-rata basis and paid quarterly to the headright owners except in the case of minors. However, this provision was subsequently modified so that the Secretary of the Interior was given authority to withhold a portion of such quarterly payments to those tribe members who had not received a certificate of competency, but the Secretary was not authorized to withhold any portion of those payments due to unrestricted Osages, Act of February 27, 1925, ch. 359, 43 Stat. 1008 (hereinafter 1925 Amendment).

Paragraph 7 of section 2 of the Osage Allotment Act provided for the issuance of certificates of competency which authorized the holder to alienate any of the lands deeded to him under the Act, except for the homestead, which remained inalienable for a limited period, and the mineral interests. Subsequently, the Act of February 5, 1948, ch. 46, 62 Stat. 18 (hereinafter 1948 Amendment), provided that all restrictions against alienation of property, except headright shares or interests in the Osage tribal mineral estate, were removed upon receipt of a certificate of competency.

After carefully examining the Osage Allotment Act and the amendments to it, we have concluded that the Act, even when liberally construed in favor of petitioner, does not exempt the headright income of an unrestricted Osage Indian from Federal income taxation.

In Choteau v. Burnet, 283 U.S. 691 [9 AFTR 1457] (1931), the Supreme Court of the United States held that the headright income of an unrestricted Osage Indian was taxable. Respondent argues that the rationale of Choteau applies, while petitioner argues that it does not in light of the subsequent amendments to the Osage Allotment Act as well as the subsequent decisions in Squire v. Copoeman, supra, and Big Eagle v. United States, supra.

In Choteau, the Supreme Court stated (283 U.S. at 695-696):

> The petitioner, then, was competent to hold and make any use (except to grant mining leases) of all his lands. All except his homestead were taxable, and were freely alienable without control or supervision of the government. *His share of the royalties from oil and gas leases was payable to him without restriction upon his use of the funds so paid.* It is evident that, as respects, his property other than his homestead,

his status is not different from that of any citizen of the United States. In the process of gradually changing the relation between the Indian and the government he has been, with respect to the income in question, fully emancipated. * * * It is true, as petitioner asserts, that as to his homestead he still remains a restricted Indian. But this fact is only significant as evidencing the contrast between his qualified power of disposition of that property and his *untrammeled ownership of the income in controversy.* The latter was clearly beyond the control of the United States. The duty to pay it into petitioner's hands, and his power to use it after it was so paid, were absolute. * * * [Emphasis supplied.]

None of the amendments to the Osage Allotment Act have placed any restrictions whatsoever on the use of the income received by an unrestricted Osage Indian from his headright shares.[8] In fact, Congress reaffirmed an unrestricted Osage Indian's "untrammeled ownership" of the headright income by passing the 1925 Amendment which provided "that the Secretary of the Interior *shall* cause to be paid at the end of each fiscal quarter to each adult member of the Osage Tribe of Indians in Oklahoma having a certificate of competency, his or her pro rata share" of the trust income. (Emphasis supplied.)

While petitioner relies heavily on the fact that decedent could not sell her headrights, we do not believe that restrictions or alienation of the *headrights* dictate nontaxability of headright *income.* In Choteau, the Court

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8. Section 4 of the Act of February 27, 1925, ch. 359, 43 Stat. 1008, 1010, authorizes the Secretary of the Interior to revoke certificates of competency in limited circumstances. However, such revocation would not restrict petitioner's ownership of funds that have already been distributed so that it has no bearing upon the instant case. Choteau v. Burnet, 283 U.S. 691 [9 AFTR 1457] (1931).

stressed Choteau's "untrammeled ownership" of the income, not the underlying headrights. Moreover, "[n]ontaxability and restriction upon alienation are distinct things." Superintendent of Five Civilized Tribes v. Commissioner, 295 U.S. 418, 421 [15 AFTR 1089] (1935). *This distinction is demonstrated in the Osage Allotment Act itself which provides that the "surplus" lands be inalienable for 25 years, but nontaxable for only three years.*

Petitioner's reliance on Squire v. Capoeman, supra, and Big Eagle v. United States, supra, is misplaced. In Squire, the Supreme Court of the United States held income received by a restricted Quinaielt Indian from the sale by the United States Government of standing timber on allotted lands was exempt from Federal income taxation pursuant to the Quinaielt Treaty, the trust patent and the General Allotment Act of 1887, 24 Stat. 388, 25 U.S.C. sec. 331 et seq. (hereinafter General Allotment Act). The courts below had held that imposition of a tax on income derived directly from the restricted lands would be inconsistent with the statutory provision of the General Allotment Act requiring the Government to transfer the fee to such lands "free of all charge or incumbrance whatsoever" at the end of the trust period. Although the Supreme Court agreed that "the general words 'charge or incumbrance' might well be sufficient to include taxation" (351 U.S. at 7), it found that an amendment to the General Allotment Act gave additional force to the argument for nontaxability, since it implied that the allotment should be free of all taxes until a patent in fee was issued.

In Big Eagle v. United States, supra, the United States Court of Claims held that the headright income of a *restricted* Osage Indian was tax exempt pursuant to the Osage Allotment Act. The court implied such exemption from the Act of March 2, 1969, ch. 493, sec. 1, 45 Stat.

1478, 1479 (hereinafter 1929 Amendment), as well as section 3 of the 1938 Amendment, both of which state—

> all royalties and bonuses arising therefrom shall belong to the Osage Tribe of Indians, and shall be disbursed to members of the Osage Tribe or their heirs or assigns as now provided by law.

The court reasoned (300 F.2d at 711) that this language obligated the United States—

> to transfer at the end of the trust *or declaration of competency*, the lands and cash received for oil and gas undiminished by any deductions levied thereon by the guardian or trustee. If the General Allotment Act implied nontaxability when it directed that trust property be turned over to the Indian after the trust period free of ALL charges, etc., certainly the implication is just the same in the Osage Allotment Act decreeing that ALL royalties and bonuses shall be turned over. If Federal income taxes are first withheld, ALL will not be turned over to the plaintiffs. [Emphasis supplied.]

Both *Squire* and *Big Eagle* dealt with restricted Indians while decedent was unrestricted. Both cases reasoned that taxation of the income in question would conflict with "the purpose of bringing [the Indian] finally to a state of competency and independence" and would "limit or undermine the Government's undertaking." Squire v. Capoeman, 351 U.S. at 10. Since decedent in the instant case had been declared competent before her death, the Government's undertaking was successfully concluded so that taxation of petitioner's headright income would no longer undermine such undertaking. It follows that the rationale of Squire and Big Eagle does not apply to the instant case.

Accordingly, we hold that the rationale of Choteau v. Burnet, supra, applies;[9] so that the headright income received by petitioner during the years in question is taxable.

Issue 2

Petitioner presents three theories in support of its position that the entire interest element[10] of the Elkins estate's tax refund is not includable in its gross income for the taxable year 1970. Petitioner argues (1) that if the refund generated any 1970 taxable income, such income is taxable to the Elkins estate rather than petitioner, (2) that all of the refund is excluded from petitioner's gross income as a bequest pursuant to section 102, and (3) that the refund was not constructively received by petitioner during 1970 so that no part of it is includable in gross income for that year under section 451.

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9. Petitioner asserts that *Choteau v. Burnet, supra,* is inapplicable because the certificate of competency was issued to decedent, not petitioner, and therefore, should have no effect on the taxability of headright income paid to petitioner. We find this argument unpersuasive because such certificate *did* affect petitioner's ownership of the headright income. The Act of March 2, 1929, ch. 493, sec. 4, 45 Stat. 1478, 1480, states:

> Upon the death of any Osage Indian of less than one-half of Osage Indian blood or upon the death of an Osage Indian who has a certificate of competency, his moneys and funds and other property accrued and accruing to his credit shall be paid and delivered to the administrator or executor of his estate to be administered upon according to the laws of the State of Oklahoma * * * Therefore, the certificate of competency gave petitioner, as well as decedent, "untrammeled ownership" of the headright income.

10. In his brief respondent concedes that a ratable portion of this interest (attributable to the amount contingently withheld) should not be included in petitioner's gross income for the taxable year 1970. Respondent computed this amount to be $18,509.81 but the correct figure is $18,515.68.

Section 641 provides:

SEC. 641 IMPOSITION OF TAX.

(a) Application of Tax.—The tax imposed by section 1(d) shall apply to the taxable income of estates or of any kind of property held in trust, including—

* * *

(3) income received by estates of deceased persons during the period of administration or settlement of the estate * * *

The applicable Income Tax Regulations provide:

Sec. 1.641(b)-3. Termination of estates and trusts.

(a) The income of an estate of a deceased person is that which is received by the estate during the period of administration or settlement. The period of administration or settlement is the period actually required by the administrator or executor to perform the ordinary duties of administration, such as the collection of assets and the payment of debts, taxes, legacies, and bequests, whether the period required is longer or shorter than the period specified under the applicable local law for the settlement of estates. * * * However, the period of administration of an estate cannot be unduly prolonged. If the administration of an estate is unreasonably prolonged, the estate is considered terminated for Federal income tax purposes after the expiration of a reasonable period for the performance by the executor of all the duties of administration. Further, an estate will be considered as terminated when all the assets have been distributed except for a reasonable amount which is set aside in good faith for the payment of unascertained or contingent liabilities and expenses (not including a claim by a beneficiary in the capacity of beneficiary).

* * *

> (d) If a trust or the administration or settlement of an estate is considered terminated under this section for Federal income tax purposes (as for instance, because administration has been unduly prolonged), the gros income, deductions, and credits of the estate or trust are, subsequent to the termination, considered the gross income, deductions, and credits of the estate or persons succeeding to the property of the estate or trust.

Therefore, any 1970 income generated by the Elkins estate's tax refund will be includable in the gross income of petitioner, as a successor to the property of the Elkins estate, *unless the refund was received by the Elkins estate during the period of administration.* Moreover, petitioner has the burden of proving that the Elkins estate had not been terminated prior to the receipt of the refund. Rule 142(a), Tax Court Rules of Practice and Procedure. Petitioner has not met this burden. There is no evidence before us to indicate that the estate was not terminated before 1970. Accordingly, we hold that the 1970 taxable income arising from the refund, if any, is taxable to petitioner, rather than the Elkins estate.

Moreover, the interest element of the refund is taxable to petitioner. Interest is included in gross income under section 61(a)(4),[11] and the section 102[12] exclusion does not

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11. Sec. 61. Gross Income Defined.

(a) General Definition.—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

* * *

(4) Interest;

12. SEC. 102. GIFTS AND INHERITANCES.

(a) General Rule.—Gross income does not include the value of property acquired by gift, bequest, devise, or inheritance.

(b) Income.—Subsection (a) shall not exclude from gross income—

(1) the income from any property referred to in subsection (a) * * *

apply to the income from any property acquired by bequest. Sec. 102(b)(1). Accordingly, we hold that the interest element of the Elkins estate's tax refund is includable in petitioner's gross income so that it is now necessary to determine if 1970 is the proper year of inclusion.

In a letter to Co-executor Little, dated March 17, 1970, the superintendent of the Osage Indian Agency stated:

> *Upon receipt of an additional coexecutors' bond in the amount of $150,000,* or in the amount determined by the court, this office will disburse said Federal estate tax refund to you and Miss Mohon *as coexecutors of the Oklahoma probate.* [Emphasis supplied.]

However, the proceeds were not disbursed to petitioner during 1970. The required bond was not submitted until 1974 and the co-executors protested the disbursement of the refund to them as the co-executors of the Oklahoma probate estate.

Section 451(a)[13] sets forth the general rule that an item of gross income is includable for the taxable year in which it is "received." Section 1.451-2(a), Income Tax Regs., states:

> Income although not actually reduced to a taxpayer's possession is constructively received by him in the taxable year during which it is credited to his account, set apart for him, or otherwise made available so that he may draw upon it during the taxable year

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13. Sec. 451. General Rule for Taxable Year of Inclusion.

(a) General Rule.—The amount of any item of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under the method of accounting used in computing taxable income, such amount is to be properly accounted for as a different period. Petitioner has not argued that the income from the refund is includable, under its accounting method, in a year other than the year of receipt, nor has it introduced any evidence to support such an argument.

> if notice of intention to withdraw had been given. However, income is not constructively received if the taxpayer's control of its receipt is subject to substantial limitations or restrictions.

Petitioner argues that the estate tax refund was not "credited to his account, set apart for him, or otherwise made available" during 1970 because the refund was credited to the Elkins estate's account on the Agency books, not decedent's or petitioner's accounts. Petitioner further argues that control of its receipt was subject to "substantial limitations or restrictions," since the Agency would not release the refund to petitioner's representatives without the posting of an additional co-executors' bond and the refund would only be released to the petitioner's representatives as co-executors of the Oklahoma ancillary estate rather than the Kansas domiciliary estate.

The refund was "set apart for [petitioner] or otherwise made available" to it during 1970, even though the refund was not actually credited to petitioner's account at the Agency. It was credited to the account of the Elkins estate of which decedent (and consequently petitioner) was the sole residuary beneficiary. Petitioner has introduced no evidence whatsoever to show that these funds were not part of the residue of the Elkins estate or that any other party had an interest in the Elkins estate. Of course, in 1974 petitioner did actually receive the funds credited to the Elkins estate's account. The superintendent's March 17, 1970, letter supports our conclusion that the refund was made available to petitioner in 1970 by stating that the refund would be distributed to petitioner's Oklahoma co-executors upon receipt of the required bond. Petitioner has failed to meet its burden of proving that the refund, less the amount being withheld, was not "made available so that [petitioner could] draw upon it at any time" when

it was credited to the account of Elkins estate on the Agency books. Rule 142(a), Tax Court Rules of Practice and Procedure.

Petitioner has also failed to meet its burden of proving that the bond requirement is a substantial limitation or restriction upon its control of the receipt of the refund. Petitioner has introduced no evidence that the co-executors could not obtain the necessary bond *whenever* they chose. Therefore, we must conclude that the time at which the bond requirement would be satisfied was within petitioner's complete control.[14] Accordingly, we hold that the bond requirement is not a substantial limitation or restriction on petitioner's control of the receipt of the refund.

Finally, requiring petitioner's representatives to receive payment on behalf of the Oklahoma ancillary estate is not a substantial restriction or limitation. It has been held that there is no constructive receipt of income where one must surrender a valuable right to realize it. Cohen v. Commissioner, 39 T.C. 1055 (1963); Griffith v. Commissioner, 35 T.C. 882 (1961). However, petitioner's representatives would have forfeited no rights by accepting the refund on behalf of the Oklahoma ancillary estate because they had no legal right to receive the refund on behalf of the Kansas

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14. We realize that in Patterson v. Commissioner, 510 F.2d 48, 51 [35 AFTR 2d 75-671] (9th Cir. 1975) the court said:

> Appellee argues that this obligation is not a "substantial limitation" because it was totally within the control of the taxpayer. However, we do not believe the doctrine of constructive receipt extends so far as to, in effect, force such a monetary commitment with an unrelated third party (the insurance company) upon the taxpayer. * * *

However, in Patterson, the monetary obligation would have been *greater* if the taxpayer had demanded payment in an *earlier* year than the one in which the income was actually received. Therefore, Patterson is distinguishable because we have no evidence before us in the instant case indicating that the cost of the bond would have been greater in 1970 than in any subsequent year including 1974 when the bond was actually obtained.

domiciliary estate. The Act of April 18, 1912, ch. 83, sec. 3, 37 Stat. 86, provides that the property of deceased Osage allottees shall be subject to the jurisdiction of the county courts of Oklahoma in probate matters. Globe Indemnity Co. v. Bruce, 81 F.2d 143, 150 (10th Cir. 1935). The Act of March 2, 1929, ch. 493, sec. 3, 45 Stat. 1478, 1480, extends the jurisdiction of the Oklahoma probate courts to unrestricted Osage Indians in the case of "his money and funds and other property accrued and accruing to his credit" in the Agency accounts. Since petitioner's representatives did not have to forfeit a valuable right in order to receive the refund on behalf of the Oklahoma ancillary estate, the requirement that the refund be received on behalf of the ancillary estate was not a substantial limitation or restriction on petitioner's control of the receipt of the refund. Accordingly, since the estate tax refund, less the amount withheld, was made available to petitioner without any substantial restrictions or limitations on its control of the receipt of such part of the refund,[15] we hold that such part of the refund was constructively received in 1970 and that petitioner's 1970 gross income should include the interest element of the refund, less the amount of the withheld funds attributable to such interest element as conceded by respondent.

Decision will be entered under Rule 155.

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15. In its brief, petitioner argues that its lack of control over receipt of the refund is demonstrated by the fact that even though the Oklahoma court ordered the Agency to disburse the refund to the Kansas co-executors in November 1973, and the required bond was submitted in May 1974, the Agency did not disburse any part of the refund until October 1974. [p. Br. p. 101]

While we sympathize with petitioner, this argument is unpersuasive. The Agency was at all times liable to petitioner for payment of the refund. In United States v. Hancock Bank, 400 F.2d 975 [22 AFTR 2d 5585] (5th Cir. 1968), the Fifth Circuit Court of Appeals held that an item of gross income had been constructively received, stating (400 F.2d at 979):

Although [the payor] undoubtedly placed an obstacle in the trustee's path to receiving the funds by placing them in a suspense account, the obstacle was wholly without legal basis.

APPENDIX C

UNITED STATES TAX COURT

Docket No. 4674-73

ESTATE OF JACQUELINE E. SHELTON, DECEASED, DONALD C. LITTLE AND JOHNNIE MOHON, CO-EXECUTORS,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the opinion of the Court filed April 11, 1977 and incorporating herein the facts recited in the respondent's computation as the findings of the Court, it is

ORDERED and DECIDED: That there are deficiencies in income tax due from the petitioners for the taxable years 1968, 1969 and 1970 in the amounts of $4,446.33, $8,139.57 and $57,931.37 respectively.

(Signed) Bruce M. Forrester
Judge.

Entered: MAY 18 1977

It is hereby stipulated that the foregoing decision is in accordance with the opinion of the Court and the respondent's computation, and that the Court may enter

this decision without prejudice to the right of either party to contest the correctness of the decision entered herein.

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Date: 5/5/77

Date: MAY 9 1977

FILED
AUG 22 1980
MICHAEL RODAK, JR., CLERK

No. 80-109

In the Supreme Court of the United States

OCTOBER TERM, 1979

ESTATE OF JACQUELINE ELKINS SHELTON, DECEASED, DONALD C. LITTLE AND JOHNNIE MOHON, CO-EXECUTORS, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
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Washington, D.C. 20530
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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 80-109

ESTATE OF JACQUELINE ELKINS SHELTON, DECEASED, DONALD C. LITTLE AND JOHNNIE MOHON, CO-EXECUTORS, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The petition in this federal income tax case presents the questions: (1) whether income from a decedent's headright share of the Osage Tribal Mineral Trust was taxable to the estate of the deceased, an Osage Indian who had received a certificate of competency; and (2) whether the estate was required to include in income in 1970 a portion of the interest paid on refunded estate taxes of the decedent's mother. Both courts below upheld the Commissioner of Internal Revenue's position that the headright income received by the decedent's executors was properly taxable to the estate on the ground that this Court's decision in *Choteau* v. *Burnet*, 283 U.S. 691 (1931) "is directly in point and controlling" (Pet. App. A2, A23). The decision below also held that the interest

received by the estate was properly includible in taxable year 1970, when it was constructively received by the estate (Pet. App. A3-A8, A29).

1. In *Choteau* v. *Burnet*, *supra*, 283 U.S. 691, this Court held that an Osage Indian who had received a certificate of competency was required to include in income his proportionate share of payments received by the Osage Tribe on mineral leases made by the Osage tribal council pursuant to authorization granted it by the Osage Allotment Act (Act of June 28, 1906, ch. 3572, 34 Stat. 539). After noting that "[his] share of the royalties from oil and gas leases was payable to him, without restriction upon his use of the funds so paid," the Court emphasized that "he has been, with respect to the income in question, fully emancipated," and concluded that "the contrast between his qualified power of disposition of that [homestead] property[1] and his untrammeled ownership of the income in controversy" did not support the view that "with respect to this income the petitioner was restricted, and therefore exempt from the tax * * *." (283 U.S. at 695-696).

The Court continues to cite *Choteau* with approval. See *Superintendent* v. *Commissioner*, 295 U.S. 418, 419, 421 (1935): "Nontaxability and restriction upon alienation are distinct things." Indeed, the Court's decision in *Squire* v. *Capoeman*, 351 U.S. 1 (1956), highlights the point. There, the Court held that proceeds of sale by the United States of standing timber on allotted lands on the Quinaielt

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[1] In *Choteau* v. *Burnet*, *supra*, 283 U.S. at 694, the Court stated that "the [Osage Allotment] Act of 1906 directed the allotment to each member of the Osage tribe of a homestead of 160 acres to be chosen by him, which was to be inalienable and nontaxable for twenty-five years or during the life of the allottee."

Indian Reservation were not taxable to the allottee-Indians. However, the decision turned on the specific language in the General Allotment Act (Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (25 U.S.C. 349), as amended by the Act of May 8, 1906, ch. 2348, 34 Stat. 182) which the Court found to evidence "a congressional intent to subject an Indian allotment to all taxes only after a patent in fee is issued to the allottee" (351 U.S. at 8). In so holding, the Court specifically noted that "a *competent* Indian, who had unrestricted control over lands and income therefrom, [is] not exempt from income tax solely because of his status as an Indian" (351 U.S. at 9-10, n. 19; emphasis in original). See also *Big Eagle* v. *United States*, 300 F. 2d 765 (Ct. Cl. 1962) (headright income from tribal mineral interests received by noncompetent Osage Indian not taxable); Rev. Rul. 77-78, 1977-1 Cum. Bull. 12 (headright income from tribal mineral interests received by Osage Indian taxable, if recipient has received certificate of competency). Here, as the court of appeals pointed out (Pet. App. A12), "Decedent was an unrestricted Osage Indian at the time of her death because she had received a certificate of competency on September 29, 1950." Accordingly, her estate was properly taxable on the headright income received after her death. Sections 61(a)(15), 102(b), 661(a)(2) and 662(a)(2) of the Internal Revenue Code of 1954 (Pet. App. A3).

2. As a necessary corollary to the cash method of accounting, Treasury Regulations on Income Tax, Section 1.451-2(a) (26 C.F.R.) provides that "Income although not actually reduced to a taxpayer's possession is constructively received by him in the taxable year during which it is credited to his account, set apart for him, or otherwise made available so that he may draw upon it at any time * * *. However, income is not constructively received if the taxpayer's control of its receipt is subject to substantial limitations or restrictions."

Here, as both courts below noted (Pet. App. A3-A4, A14-A16), in January, 1970, the Internal Revenue Service paid a $150,241.96 income tax refund ($92,578.42 of which was allocable to interest) to the Osage Indian Agency, and that amount was credited to the estate account of which the decedent was the sole beneficiary on January 12, 1970. By letter dated March 17, 1970, the decedent's estate's co-executors were advised "that, upon receipt of an additional co-executors' bond, the Agency would disburse the Elkins estate's tax refund to them as co-executors of decedent's Oklahoma ancillary probate estate" Pet. App. A15).

While the estate urged that receipt of the income tax refund was subject to substantial limitations or restrictions, *viz.*, the requirement of the Agency that an additional bond be posted, and that the payment be made to the co-executors in the ancillary Oklahoma estate proceeding, the courts below properly rejected this conclusion.[2] As the court of appeals pointed out (Pet. App. A6): "No case was cited, or found, holding that requiring a normal fiduciary bond in a probate proceeding is a substantial limitation or restriction justifying postponement of income tax consequences until the fiduciary chooses to file it. The fees for such bonds are standard and modest, and would not be different in amount whenever obtained."

Moreover, the courts below correctly concluded that the Agency's insistence that the refund be payable through the Oklahoma proceeding, and not, as the estate urged, through an ancillary Kansas proceeding, did not justify

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[2]Because the Agency withheld 20 percent of the refund for payment of a possible attorney's fee claim, the Internal Revenue Service stipulated that a ratable portion of the refund attributable to interest was not constructively received in 1970 (Pet. App. A8, A16).

postponing recognition of the income for federal income tax purposes. The payment was in reality to the estate, which was the same in both proceedings. The court of appeals therefore properly concluded (Pet. App. A8) that "the co-executors were firmly informed in 1970 that the Agency would not deliver the funds other than to the Oklahoma coexecutors. At this point it was incumbent upon the coexecutors, if they thought that was erroneous, to bring some legal action to secure a different disposition if they wished to avoid constructive receipt."

It is therefore respectively submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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